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Supreme Court, U.S.
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No. 10-28

In the Supreme Court of the United States

ANN CHAE, WILLIAM COAKLEY, HOON KOO, AND CARLOS PINEDA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

V.

SLM CORPORATION, SALLIE MAE, INC., SALLIE MAE SERVICING CORPORATION, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PRIVATE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the unanimous court of appeals erred in concluding that petitioners' state law claims challenging certain lending practices are preempted by the Higher Education Act of 1965 ("HEA"), 20 U.S.C. §§ 1001 et seq., and comprehensive federal regulations thereunder, which, as the agency has confirmed in this case, expressly authorize the very practices at issue.

RULE 29.6 STATEMENT

SLM Corporation is a holding company and the parent of Sallie Mae, Inc. No publicly held company holds more than 10% of its stock. Sallie Mae Servicing Corporation no longer exists.

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INTRODUCTION

This case involves a putative class action brought by student borrowers under state law challenging certain longstanding practices used by respondent Sallie Mae, Inc., in connection with servicing loans made pursuant to the Higher Education Act of 1965 ("HEA"), 20 U.S.C. §§ 1001 et seq., and the Federal Family Education Loan Program ("FFELP"), 20 U.S.C. §§ 1071-1087-4.[1] The district court concluded that petitioners' claims failed on the merits and, alternatively, were preempted by the HEA and accompanying federal regulations. Pet. App. 33-78. The court of appeals affirmed on the ground that the claims at issue are preempted. Pet. App. 1-30. The court's unanimous decision is correct, involves case-specific application of settled law, and does not conflict with any decision of this Court or of another court of appeals. The United States, which intervened below to argue that petitioners' claims are preempted by the HEA and the comprehensive federal regulations governing the issuance and servicing of the loans at issue, has waived a brief in opposition. The petition should be denied.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Congress established the FFELP, a system of loan

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[1] Neither respondent SLM Corporation nor Sallie Mae Servicing Corporation is a proper party to this case. SLM Corporation does not service loans (and thus did not engage in any of the alleged practices at issue) and Sallie Mae Servicing Corporation no longer exists. *See* Supp. ER, *Chae v. SLM Corp.*, No. 08-56154 (9th Cir.), at 154. Accordingly, this brief refers only to respondent Sallie Mae, Inc. ("Sallie Mae").

guarantees, to encourage private lenders to loan funds on favorable terms to students and their parents. 20 U.S.C. §§ 1071-1087-4. The FFELP was created by Title IV of the Higher Education Act ("HEA"), 20 U.S.C. §§ 1001-1155, as part of a broader Congressional initiative designed to ensure all students greater access to higher education. The FFELP governs loans made to students by private lenders, 34 C.F.R. § 682.100, while the government operates a paralliel program called the William D. Ford Federal Direct Loan Program, through which it lends money directly to students, 20 U.S.C. §§ 1087a-1087j.

Under the FFELP, private lenders utilize their own funds to make loans to students attending post-secondary institutions. These loans are guaranteed by state or non-profit entities known as guaranty agencies, which are reinsured by the federal government. *See* 20 U.S.C. § 1078(a)-(c). If a borrower defaults on a student loan and the private lender is unable to recover the amount despite due diligence, the lender recoups its loss from the guarantor. 34 C.F.R. § 682.102(e)(7). The guarantor must take diligent steps to recover the default amount, but may then recover up to one hundred percent of its losses from the government if it is unable to collect the debt. 34 C.F.R. §§ 682.404(a), 682.410(b)(6).

There are three types of loans authorized by the FFELP. *See* 20 U.S.C. § 1078-3. Stafford Loans are loans made to students. They are either subsidized—the government pays interest on the loan during specified periods—or unsubsidized—the student borrower is responsible for all interest payments on the loan. 20 U.S.C. §§ 1071(c), 1078, 1078-8. PLUS loans are available annually to parents of

undergraduate students. 20 U.S.C. § 1078-2. Consolidation loans pay off the outstanding balances on a borrower's existing FFELP loans and consolidate them into a single loan with a fixed interest rate. *Id.* § 1078-2(e).

Congress authorized the Secretary of the Department of Education ("DOE") to administer the FFELP and "prescribe such regulations as may be necessary to carry out [its] purposes." *Id.* § 1082(a)(1). Pursuant to that authority, DOE has promulgated detailed regulations that govern and enforce the FFELP. *See* 34 C.F.R. §§ 682.100-.800. *See* Brief of Plaintiff-Intervenor-Appellee United States, *Chae*, at 3-5 (summarizing "comprehensive statutory and regulatory requirements" under the FFELP).

Among other things, DOE requires private lenders to use standardized loan applications and promissory notes with student borrowers, and to provide those borrowers with loan disclosure statements and repayment schedules that follow DOE's regulatory requirements. 20 U.S.C. § 1082(m)(1)-(3); 34 C.F.R. § 682.401(d)(3). DOE's standardized promissory notes state that interest accrues from the date loan funds are disbursed and permit lenders to set the first payment due date up to sixty days after disbursement. *See* 20 U.S.C. §§ 1078-2(d)(1); 1078-3(c)(4); 34 C.F.R. § 682.209(a)(1). Neither the HEA nor DOE's regulations prohibit lenders or third-party servicers from charging interest from the date the loan is disbursed.

DOE's regulations also authorize lenders and third-party servicers to charge late fees for loan payments that are made more than fifteen days after their scheduled due dates. 34 C.F.R. § 682.202(f)(1). DOE's

publications specifically confirm that late payments can lead to both late fees and the additional accrual of interest. For example, one DOE publication, entitled *Repaying Your Student Loans*, states "[i]f you're delinquent, excess interest will accrue. You might also have collection charges or late fees." Federal Student Aid, Department of Education, *Repaying Your Student Loans* 31, *available at* http://www.stjohnscollege.edu/resources/repay.pdf (last visited Aug. 18, 2010).

As part of the extensive regulations that govern operation of the FFELP, DOE also has promulgated regulatory enforcement mechanisms. *See* 34 C.F.R. § 682.700-.713; 20 U.S.C. §§ 1082(a)(2), (g)(1), (h)(1). For example, upon receipt of a complaint against a lender or third-party servicer, DOE may file suit against the lender, impose civil penalties on it, and terminate the lender's participation in the FFELP. 20 U.S.C. §§ 1082(a)(2), (g)(1), (h)(1). DOE may additionally take emergency action to stop the issuance of guarantee commitments if it receives information that a lender or third-party servicer is in violation of applicable laws or regulations. 34 C.F.R. § 682.704(a)(1).

Congress discontinued the FFELP as of July 1, 2010. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201, 124 Stat. 1029, 1074. Federal student loans are now available solely through the Direct Loan Program. 20 U.S.C. § 1087a-1087j.

B. Factual And Procedural Background

Petitioners are California residents who took out Stafford and Consolidation loans from various lenders between 1993 and 2006. Respondent Sallie Mae is engaged in the business of processing and servicing

student loans, including loans authorized and regulated under the FFELP. Respondent serviced each of petitioners' loans and performed administrative and servicing tasks, including issuing billing statements, collecting and processing payments, assessing and collecting late fees, and providing notices required by the FFELP regulations. Pet. App. 6-7, 34.

Petitioners sued respondent on behalf of a purported class of similarly-situated California borrowers, challenging respondent's methods of calculating interest, setting repayment start dates, and assessing late fees. Petitioners brought state law causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and unfair competition and sought actual and punitive damages, restitution, and injunctive relief.

First, petitioners challenged respondent's use of the "daily simple interest" method of calculating interest, under which Sallie Mae applies payments against the loan balance on the date received and calculates accrued interest based on the number of days since the last payment. According to petitioners, respondent should have used the "installment method" instead, under which payments are applied as of the due date, not the date received, even though FFELP regulations require respondent to use the daily simple interest method. 34 C.F.R. § 682.304(b)-(c); *see* Pet. App. 60-66. Petitioners have since abandoned that claim. Pet. 7 n.2.

Second, petitioners challenged respondent's practice of charging interest on loans from the day they are disbursed and setting the borrower's first repayment date within sixty days after disbursement, even though the DOE regulations provide that "[t]he first payment date [on Consolidation and PLUS loans]

is due 60 days after the date the loan is disbursed." 34 C.F.R. § 682.209(a); *see* Pet. App. 67-68. Petitioners argued that, by charging interest during the sixty-day period after disbursement, respondent allegedly increased the cost and life span of the loan.

Third, petitioners challenged respondent's practice of assessing late fees. As permitted by the FFELP regulations, 34 C.F.R. § 682.202(f), respondent charges a late fee equaling six percent of the overdue amount on FFELP loan payments that are made more than fifteen days after the payment's due date. *See* Pet. App. 68-69. Petitioners argued that respondent's assessment of late fees, while using the daily simple method of calculating interest, was punitive.

After petitioners filed suit, the United States (on behalf of DOE) filed a motion to intervene as a plaintiff seeking a declaratory judgment that petitioners' state law claims were preempted by the HEA. The district court granted the government's motion. Shortly thereafter, respondent moved for summary judgment, arguing that petitioners' state law claims were preempted by the HEA and, alternatively, that they failed on the merits. The government moved for summary judgment on preemption grounds, and petitioners moved for partial summary judgment.

C. Decisions Below

1. The district court granted summary judgment for respondent. Pet. App. 31-32. The district court concluded that each of petitioners' state law claims failed on the merits, explaining that the practices at issue were authorized by federal law and in accordance with the terms of petitioners' contracts. Pet. App. 70-76. The district court also agreed with respondent and the United States that petitioners' claims are

preempted by the HEA and federal regulations, explaining that "contrary state causes of action or theories such as those offered by [petitioners] that seek to limit or undermine the framework designed by Congress and the DOE can only be characterized as risking the creation of irreconcilable conflict and the imposition of obstacles to the accomplishment and execution of the full purposes and objectives of the HEA." Pet. App. 78.

2. The Ninth Circuit unanimously affirmed on the ground that petitioners' state law claims are preempted by federal law. Pet. App. 1-30.

The Ninth Circuit first held that petitioners' state law claims based on alleged misrepresentations in respondent's billing and standardized loan applications as to the use of the daily simple interest method and repayment dates were expressly preempted by 20 U.S.C. § 1098g, which provides that "[l]oans made, insured, or guaranteed pursuant to [the FFELP] ... shall not be subject to any disclosure requirements of any State law." Pet. App. 11-14. The court found that the so-called misrepresentation claims were simply "re-styled improper-disclosure claims" and reasoned that "preemption cannot be avoided simply by relabeling an otherwise-preempted claim." Pet. App. 13-14.

The court then held that petitioners' remaining claims were preempted by the HEA and governing regulations by settled conflict preemption principles. Pet. App. 15-29. At the outset, the court observed that it "must be cautious about conflict preemption where a federal statute is urged to conflict with state law regulations within the traditional scope of the state's police powers," and the court started with an "assumption" that state law was not preempted. Pet.

App. 16. However, the court explained that it was its "duty to consider carefully what Congress was trying to accomplish in the HEA and whether these state law claims create an 'obstacle' to the congressional purposes." *Id.* Looking to the HEA "as a whole" and the comprehensive regulatory scheme, the court held that petitioners' claims are preempted. Pet. App. 17.

The court explained that the HEA describes the "nuts and bolts of the FFELP," including the required terms of each type of loan, the repayment terms, and insurance and guaranty requirements; that Congress directed DOE to standardize applications, forms, and promissory notes; and that Congress mandated consistency between loans made under the FFELP and loans made under the Direct Loan Program. Pet. App. 17-18. The court further observed that the FFELP "'requires uniformly administered ... standards in order to remain viable'" and that "[o]ne need not have an advanced degree in risk management and financial practices to believe ... that 'exposure to lawsuits under fifty separate sets of laws and court systems could make lenders reluctant to make new federally-guaranteed student loans.'" Pet. App. 19 (citations omitted).

The court concluded that petitioners' reliance on *College Loan Corp. v. SLM Corp.*, 396 F.3d 588 (4th Cir. 2005), was misplaced. As the court explained, even if it were "within the Fourth Circuit" (and thus were bound by the decision), *College Loan* was "distinguishable from our case" in at least two key respects. Pet. App. 20-21. First, the court explained, *College Loan* involved a contractual relationship between *lenders*—not borrowers—"which is not a relationship that the FFELP is primarily designed to

govern." Pet. App. 20. Second, the court pointed out that "the plaintiff in *College Loan* sought to enforce FFELP rules, not to vary them." Pet. App. 20-21. By contrast, petitioners here, the court noted, "do not seek to buttress the FFELP framework, but rather to alter it in their home state." Pet. App. 21.

The court further concluded that petitioners' state law claims stood as an obstacle to the accomplishment of the federal objectives of the HEA and regulatory scheme designed to encourage private lenders to loan funds to students on favorable terms. Pet. App. 23-29. The court reasoned that because the FFELP expressly *permits* third-party servicers to charge late fees and authorizes them to set the first repayment date up to sixty days out, petitioners' position that California law *prohibits* these practices would create an obstacle to the uniform regulatory system that permits both practices. The court explained that "subjecting the federal regulatory standards to the potentially conflicting standards of fifty states on contract and consumer protection principles would stand as a severe obstacle to the effective promotion of the funding of student loans." Pet. App. 30. The court also explained that its conclusion squared with the "considered view" of the agency charged with implementing this scheme. Pet. App. 28.

3. Petitioners filed a petition for rehearing en banc, which the court of appeals denied with no judge requesting a vote on the petition. Pet. App. 82.

REASONS FOR DENYING THE WRIT

The petition in this case satisfies none of this Court's criteria for certiorari. S. Ct. R. 10. Petitioners seek review of a unanimous decision that is consistent with this Court's precedent and does not conflict with

the decision of any other court. Nor does the petition raise an issue of exceptional importance. As the relative dearth of case law discussing the question presented underscores, the question raised by the petition does not arise frequently and petitioner has pointed to no compelling reason why this Court's review is warranted here. The fact that the United States has seen fit to waive a response underscores the *lack* of importance of this case. And petitioners' claim for review is further diminished by the fact that, as the district court concluded, petitioners' claims each fail on the merits regardless of the preemption analysis. Accordingly, the petition should be denied.

I. THE UNANIMOUS DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS

The court of appeals' unanimous decision is correct, involves case-specific application of settled preemption principles, and accords with the position of the expert agency charged with implementing the program.

A. The Court Of Appeals Correctly Held That Petitioners' Disclosure-Related Claims Are Expressly Preempted

Congress may indicate its intent to displace state law through express language. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). The FFELP expressly preempts state disclosure requirements. *See* 20 U.S.C. § 1098g ("Loans made, insured, or guaranteed pursuant to [the FFELP] *shall not* be subject to any disclosure requirements of any State law.") (emphasis added). This express preemption provision extends to disclosure requirements that stem from state common-law as well as state statutes and regulations. *See, e.g., Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008);

Medtronic, Inc. v. Lohr, 518 U.S. 470, 488 (1996).

Several of petitioners' state law claims alleged misrepresentations in respondent's billing statements and coupon books over the use of federally-approved practices, including the simple daily interest calculation and setting the first repayment date up to sixty days after disbursement. Pet. App. 12-13. As the court of appeals recognized, rather than challenge the use of these federally-approved practices, petitioners attempted to "re-style[]" their claims under California's Unfair Competition Law and the Consumer Legal Remedies Act and argued that respondent's disclosures were misleading. Pet. App. 14.

The court of appeals correctly held that those claims are preempted. As the court explained, petitioners' efforts to recast their claims ran directly into the express preemption provision of the HEA barring the operation of state disclosure laws. In substance, petitioners challenged the method that respondent used to communicate to borrowers about its federally-approved practices. But claims that state law requires alternate disclosures to have been made are expressly preempted by 20 U.S.C. § 1098g. The court of appeals' fact-bound characterization of petitioners' misrepresentation claims was correct and, in any event, does not warrant this Court's review.

Moreover, the court of appeals' decision as to these claims is in accord with this Court's express preemption decisions, including *Altria Group* and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). In keeping with these decisions, the Ninth Circuit used "the text of the provision, the surrounding statutory framework, and Congress's stated purposes in enacting

the statute to determine the proper scope of [the] express preemption provision." Pet. App. 11-12 (*citing Lohr*, 518 U.S. at 485-86; *Cipollone*, 505 U.S. at 516). That is precisely what this Court's precedents call on lower courts to do. *See Altria Group*, 129 S. Ct. at 551; *Cipollone*, 505 U.S. at 516. Contrary to the suggestion of petitioners, the decision below therefore in no way conflicts with this Court's precedents.[2]

B. The Court Of Appeals Correctly Held that Petitioners' Remaining Claims Are Impliedly Preempted

The court of appeals correctly held that petitioners' remaining claims for breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, and use of fraudulent and deceptive practices are impliedly preempted because they create an "'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Pet. App. 15 (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000)). The court's analysis was based on a case-specific and faithful application of well-settled preemption principles and accords with the view of the expert agency charged with implementing the HEA and federal regulation scheme. Pet. App. 15-29.

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[2] To the extent that petitioners contend that *Cipollone* stands for the proposition that Congress's inclusion of an express preemption provision precludes a finding of implied preemption under the statute for other claims, *see* Pet. 10, this Court has definitively rejected that argument. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (stating that *Cipollone* does not "obviate the need for analysis of an individual statute's pre-emptive effects," including consideration of implied preemption).

The court of appeals correctly stated the governing principles and emphasized at the outset that it was proceeding with "cautio[n]" in considering whether petitioners' claims were preempted. Pet. App. 16. The court explained that "[c]ontract and consumer protection laws have traditionally been in state law enforcement hands" and, although it "would not lightly decide that [petitioners'] ... claims under California law are preempted by conflict preemption," it also recognized its duty to "consider carefully" Congress' objectives in passing the HEA. *Id.*

In "agree[ing] with the DOE that Congress intended it to operate uniformly," the court pointed to the comprehensive framework that Congress established to govern the FFELP, which includes, *inter alia*, provisions setting the allowable interest rates, borrowing limits, and provisions authorizing limits and lengths of the loans. Pet. App. 17; *see* Pet. App. 18-19. In accordance with this Court's precedents, the court of appeals "'look[ed] to the provisions of the whole law.'" Pet. App. 17 (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992)). Moreover, the court thoroughly and accurately analyzed congressional intent in passing the FFELP and concluded that "it aimed for uniformity" in the regulatory program. *Id.*; *see* Pet. App. 17-19. The court of appeals properly recognized that some flexibility within the regulations does not mean that regulatory uniformity is not vital to the FFELP's success. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155-56 (1982).

Moreover, the court of appeals reasonably concluded that allowing petitioners' state law challenges to the late fees and the repayment start

date to go forward would create an obstacle to the operation of the FFELP because the agency's regulations explicitly permit those practices. As the agency explained, and the court recognized, the federal regulations explicitly permit imposition of a late fee when daily simple interest is used, 34 C.F.R. § 682.202(f)(2), explicitly authorize lenders to set the first repayment date up to sixty days after disbursement and collect interest during those sixty days, *see* 20 U.S.C. §§ 1078-2(d)(1), 1078-3(c)(4); 34 C.F.R. § 682.209(a). Pet. App. 24-25. As the court explained, allowing state law to prohibit practices that are expressly authorized by federal law would pose an obvious conflict. *Id.*

The court of appeals also properly recognized the common sense principle that permitting varying state law challenges across the country to lending practices, with state law standards that may differ and impede uniformity, would result in higher costs for the FFELP, fewer loans made under the program, or loans made for lesser amounts, making it harder for students to gain the loan funds they need. Pet. App. 19-20. As the court appropriately recognized, this scheme "would impair and threaten the efficacy of the federal lending effort for students." *Id.*

The court of appeals' conclusion also squared with the "considered view" of the expert agency charged with implementing the FFELP. Pet. App. 28. As this Court has repeatedly held, courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see also Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2477 (2009); *Long Island Care*

at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007); *Auer v. Robbins*, 519 U.S. 452, 457 (1997). The agency here explained that its regulations explicitly authorized the practices at issue. In addition, this Court has observed that agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (citation omitted). As the court of appeals also recognized, "[t]he DOE has consistently implemented its uniform policy, and there is nothing to signal that deference to its position is unwarranted." Pet. App. 28.[3]

Petitioners point to the absence of a private right of action under the FFELP. Pet. 11. But the lack of a private right of action does not compel a finding of no preemption—and does not translate to the lack of a

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[3] Nothing in *Wyeth* is to the contrary. In *Wyeth*, the Court declined to defer to FDA's position regarding the preemptive effect of one of its provisions because it concluded that the agency's position represented a "dramatic change in position" and that the agency's view was "at odds with what evidence we have of Congress'[s] purpose." 129 S. Ct. at 1201, 1203. The agency's considered interpretation here, by contrast, is lock step with the evidence of Congress's intent and DOE's consistent position on the FFELP. Moreover, in *Wyeth* the Court did not "consider the preemptive effect of a specific agency regulation bearing the force of law." *Id.* at 2103. As discussed, the agency's position in this case directly concerns the preemptive effect of regulations that have the force of law. In any event, the court of appeals "performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.* at 1200-01. The court therefore did precisely what *Wyeth* instructs by "attend[ing] to [DOE's] explanation of how state law affects the regulatory scheme." *Id.* at 1201.

remedy. Here, there are alternative administrative mechanisms in place to address any abusive lending or servicing practices. DOE is authorized to institute informal compliance procedures against a third-party servicer that is the subject of a complaint. 34 C.F.R. § 682.703. And, when necessary, DOE may even file suit against the servicer, impose civil penalties, and terminate the servicer's participation in the FFELP. 20 U.S.C. §§ 1082(a)(2), (g)(1), (h)(1). "Where, as here, a statute provides administrative remedies, there is a presumption that Congress ... provided precisely the remedies it considered appropriate." *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1222-23 (11 Cir. 2002).

II. THE UNANIMOUS DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

The petition fails to identify any genuine conflict of authority between the decision below and that of any other lower court. That failure, in itself, counsels heavily in favor of denying the petition, given that the "principal purpose" for which the Court uses its "certiorari jurisdiction ... is to resolve conflicts among the United States courts of appeals." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Petitioners do not even attempt to allege a split of authority over the court of appeals' express preemption ruling. Instead, they focus their efforts on attempting to manufacture a conflict between the decision below and the Fourth Circuit's decision in *College Loan*. Pet. 13-14. That effort fails.

A. The Alleged Conflict With The Fourth Circuit's Decision In *College Loan* Is Unavailing

Petitioners allege a conflict between the "Ninth and

Fourth Circuits as to whether uniformity is an objective of the FFELP." Pet. 21. But that asserted conflict is illusory because—as the court of appeals explained—the *College Loan* case is distinguishable in at least two key respects. Pet. App. 20-21. First, *College Loan* involved a dispute between private *lenders*. The lender-to-lender relationship is covered by neither the HEA nor DOE regulations. As the Fourth Circuit itself stressed in *College Loan*, "[i]mportantly, neither the district court nor the parties have explained how [the HEA's] purposes would be compromised by a lender, such as College Loan, pursuing breach of contract or tort claims against *other lenders or servicers*." 396 F.3d at 597 (emphasis added). By contrast, this action was brought by student borrowers against a private lender—a relationship that directly implicates the Act's *core* interests. In regulating the relationships between private lenders and student borrowers, the HEA's statutory mandate for uniformity is unassailable.

Second, the claims at issue in *College Loan* were different from those alleged here. The plaintiff in *College Loan* alleged breach of contract claims based on violations of the HEA because the contract at issue expressly made compliance with the HEA a provision in the contract. In other words, the plaintiff sought to *enforce* the FFELP's core rules. The Fourth Circuit declined to permit the defendant to enter into a contract that specifically "invoked a federal standard as the indicator of compliance, then to proceed to breach its duties thereunder and to shield its breach by pleading preemption." *Id.* at 598. The Fourth Circuit limited its analysis to the facts of the case before it by stating that "[i]n this case at least, federal supremacy

does not mandate such a result." *Id.* Using a FFELP violation as an element of the prima facie breach of contract claim would not undermine the regulations and posed no threat to accomplishment of congressional purposes. *Id.* Here, by contrast, petitioners' claims challenge practices that are affirmatively permitted by the FFELP. Thus, rather than seeking to *enforce* the FFELP's core rules and regulations (like the plaintiff in *College Loan*), they seek to *alter* their application to California borrowers.

Not only is *College Loan* distinguishable—as the court of appeals below recognized, Pet. App. 20-21—but the *dicta* on the extent to which uniformity is an objective of the HEA does not create any genuine conflict with the decision below either. Petitioners point out that, in rejecting the defendant's preemption argument in *College Loan*, the Fourth Circuit stated that "[w]e are unable to confirm that the creation of 'uniformity[]' ... was actually an important goal of the HEA." 396 F.3d at 597. The Fourth Circuit did not determine that uniformity was not a goal of the HEA; rather, it simply stated that it could not confirm that uniformity was an important goal of the HEA—in the lender-versus-lender context in which the case arose. And, in any event, any tension between *dicta* in *College Loan* and the decision below on uniformity concerns does not warrant review. "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted).[4]

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[4] In *College Loan*, the Fourth Circuit observed that the existence of "comprehensive federal regulations" is not—standing alone—sufficient to preempt state law claims. 396 F.3d at 598.

B. The Decision Below Is In Line With The Decisions Of Other Courts

Far from conflicting with the decisions of other courts, the decision below is in line with the decisions of the other lower courts that have considered analogous issues. *See Armstrong v. Accounting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (holding that DOE regulations that expressly permit lenders to rely in good faith on eligibility representations by students and schools preempt claims of mistake and illegality based on eligibility requirements because such claims would stand as an obstacle to Congress's objectives); *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996) (holding that the federal regulations implementing FFELP's predecessor program preempted any application of Oregon's Unfair Debt Collection Practices Act where the federal regulations established certain collection efforts that loan collectors must undertake to show due diligence while the Oregon law restricted or prohibited such collection activity); *Morgan v. Markerdowne Corp.*, 976 F. Supp. 301, 319 (D.N.J. 1997).

Petitioners cite *Cliff v. Payco General American Credits, Inc.*, 363 F.3d 1113 (11th Cir. 2004), but reliance on this decision is misplaced. The plaintiff in *Cliff* challenged the method by which the defendant garnished the plaintiff's wages. His allegations were

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The court of appeals below, however, did not rely simply on the existence of a comprehensive federal scheme. Rather, the court addressed the actual obstacles that petitioners' state law claims would present to the operation of the FFELP, including the regulations passed by DOE covering the specific practices at issue. There were no such obstacles in *College Loan*.

based upon a provision of Florida law that did not actually hinder the completion of debt-collection activities required under the HEA. *Id.* at 1129 n.12. As a result, quite unlike the claims at issue in this case, the plaintiff's claims in *Cliff* did not pose an obstacle to the purposes and objectives of the HEA. Moreover, in finding that state law posed no obstacle to the HEA's objectives, the court in *Cliff* emphasized that DOE had not expressed a contrary opinion. *Id.* at 1128-29 & n.11. Here, of course, the agency intervened to argue that allowing petitioners' claims to proceed would interfere with the operation of the FFELP.

III. THIS CASE IS A POOR VEHICLE FOR REVIEW GIVEN THAT THE CLAIMS ARE MERITLESS IN ANY EVENT

As the district court concluded, even if petitioner's state law claims were not preempted, they would obviously fail on the merits. *See* Pet. App. 70-76. That is all the more reason to deny review in this case and preserve the Court's scarce resources for cases presenting issues of genuine national importance and a conflict of authority necessitating resolution.[5]

Petitioners brought claims under the Unfair Competition Law ("UCL"), which prohibits "any unlawful, unfair, or fraudulent business act." Cal. Bus. & Prof. Code § 17200. A person seeking to assert a claim under the UCL must demonstrate a violation of

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[5] In the court of appeals, petitioners narrowed their breach of contract claim to focus solely on respondent's method of charging interest. Plaintiff-Appellants' Opening Br. 50. Because petitioners have now abandoned their claims challenging respondent's use of the daily simple interest method of charging interest, Pet. 6, 7 n.2, they no longer advance a breach of contract claim.

an underlying law, as well as injury in fact and causation. However, "[a] business practice that might otherwise be considered unfair or deceptive cannot be the basis of a [UCL] cause of action if the conduct has been deemed lawful" under state or federal law. *Byars v. SCME Mortgage Bankers, Inc.*, 135 Cal. Rptr. 2d 796, 805 (Ct. App. 2003). Here, the two practices challenged by petitioners are authorized by DOE's regulatory scheme, and therefore cannot be considered "unlawful," "unfair," or "fraudulent" as a matter of law.

Petitioners also alleged a violation of the implied covenant of good faith and fair dealing, which is "'read into contracts ... to protect the express covenants or promises of the contract.'" *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 398-99 (Ct. App. 1990). The implied covenant, however, cannot contradict the express terms of a contract. *See Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 122 Cal. Rptr. 2d 267, 276, 283-84 (Ct. App. 2002). A practice that is expressly permitted under the contract therefore can never violate an implied covenant of good faith and fair dealing. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 728 (Cal. 1992) (holding that, where termination of a lease was expressly permitted by the lease, termination could never violate an implied covenant of good faith and fair dealing). The FFELP loan documents at issue expressly permit respondent to use the challenged practices. Pet. App. 73.

Under California law, the right to bring a private cause of action under the Consumers Legal Remedies Act ("CLRA") is limited to consumers who suffer damage as a result of the use or employment by any person of a method, act, or practice declared to be

unlawful by California Civil Code § 1770. A critical element of such a claim is that plaintiff must demonstrate that the defendant's conduct occurred in the context of a transaction resulting in the sale or lease of goods or services. Petitioners' CLRA claims are definitively foreclosed by California precedent. *See Berry v. American Express Publ'g, Inc.*, 54 Cal. Rptr. 3d 91 (Ct. App. 2007).

In *Berry*, the plaintiff alleged that the defendant violated the CLRA by including an unconscionable provision in a credit card agreement. *Id.* at 93. The plaintiff argued that his credit card agreement involved "services furnished in connection with the sale ... of goods" under the CLRA because the cardholder could use the credit card to purchase goods or services. *Id.* at 94. The California Court of Appeal rejected this argument, finding that "neither the express text of CLRA nor its legislative history supports the notion that credit transactions separate and apart from any sale or lease of goods or services are covered under the act." *Id.* at 97. The student loan transactions involved in this case are directly analogous to the credit transactions in *Berry*—and therefore are not subject to regulation under the CLRA. Moreover, a plaintiff alleging a CLRA cause of action must comply with the written notice requirement of California Civil Code § 1782(a), which petitioners did not do. Pet. App. 75.

Petitioners' unjust enrichment claims are baseless as well. It is settled that where express and binding contracts exist that define the parties' rights, there is no claim for unjust enrichment. *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, 49 Cal. Rptr. 2d 191, 197-98 (Ct. App. 1996). Here, the parties' rights are defined by the loan agreements. Pet. App. 76.

Finally, the question presented is not a frequently recurring one. There are only a handful of decisions regarding federal preemption as it applies to the FFELP and this Court denied the petitions for certiorari in *Armstrong* and *Brannan*. *See Armstrong*, 168 F.3d 1362, *cert. denied*, 528 U.S. 1073 (2000); *Brannan*, 94 F.3d 1260, *cert. denied*, 521 U.S. 1106 (1997). Moreover, respondent is unaware of and petitioners have not cited—a single decision across the country that holds that either of the lending practices now at issue in this case are prohibited. Indeed, as discussed above, both of the remaining challenged practices are definitively authorized by federal law. The fact that the question presented does not arise with any frequency underscores that there is no reason for this Court to reach out and review this case.[6]

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[6] In *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, this Court will consider whether a Federal Motor Vehicle Safety Standard that gives vehicle manufacturers the option of installing either of two types of seatbelts in certain seating positions impliedly preempts state tort claims alleging that a manufacturer should have installed one type of seatbelt instead of the other. Given the contextualized nature of implied preemption analysis, the Court's decision in *Williamson*—which will address a different federal statute, a different set of regulations, and different common-law claims—will have no impact on the instant case. Moreover, the Safety Act at issue in *Williamson* has an express saving clause that this Court held in *Geier*—affects the preemption analysis. The HEA has no such savings clause. In addition, the fact that this Court has agreed to hear *Williamson* can in no way make up for the fundamental deficiencies in the petition in this case. Accordingly, there is no reason to hold this case for the disposition in *Williamson*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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